

Statement on Signing the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023

December 23, 2022

Today, I have signed into law H.R. 7776, the "James M. Inhofe National Defense Authorization Act for Fiscal Year 2023" (the "Act"). The Act authorizes fiscal year appropriations for the Department of Defense, for Department of Energy national security programs, and for the Department of State, Department of Homeland Security, and the Intelligence Community. The Act provides vital benefits and enhances access to justice for military personnel and their families, and includes critical authorities to support our country's national defense, foreign affairs, and homeland security. While I am pleased to support these critical objectives, I note that certain provisions of the Act raise concerns.

Section 1033 of the Act continues to bar the use of funds appropriated to the Department of Defense to transfer Guantánamo Bay detainees to the custody or effective control of certain foreign countries. Section 1031 of the Act likewise would continue to prohibit the use of such funds to transfer certain Guantánamo Bay detainees into the United States. It is the longstanding position of the executive branch that these provisions unduly impair the ability of the executive branch to determine when and where to prosecute Guantánamo Bay detainees and where to send them upon release. In some circumstances, these provisions could make it difficult to comply with the final judgment of a court that has directed the release of a detainee on writ of habeas corpus, including by constraining the flexibility of the executive branch with respect to its engagement in delicate negotiations with foreign countries over the potential transfer of detainees. I urge the Congress to eliminate these restrictions as soon as possible.

Moreover, certain provisions of the Act raise constitutional concerns or questions of construction.

A number of provisions of the Act (e.g., sections 1209(c), 1236(a), 1237, 1240, 1276(d), 1640(d), 5510(c), 5593(e), 6316, and 6402) would effectively require the President and other executive branch officials to submit reports and plans to certain congressional committees that will, in the ordinary course, include highly sensitive classified information, including information that could reveal critical intelligence sources or military operational plans. The Constitution vests the President with the authority to prevent the disclosure of such highly sensitive information in order to discharge his responsibility to protect the national security. At the same time, congressional committees have legitimate needs to perform vital oversight and other legislative functions with respect to national security and military matters. Accordingly, it has been the common practice of the executive branch to comply with statutory reporting requirements in a way that satisfies congressional needs pursuant to the traditional accommodation practice and consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters. I believe the Congress shares this understanding, and my Administration will presume it is incorporated into statutory reporting requirements of the kind at issue in the Act.

Moreover, section 6316 of the Act purports to require the President, acting through the Director of National Intelligence, to submit to certain congressional intelligence committees (and appropriations subcommittees) all Presidential Executive Orders, memoranda, and policy directives that "contain a direction to, establish a requirement for, or include a restriction on any element of the intelligence community." My Administration is fully committed to continuing to fulfill its statutory obligations to keep the intelligence committees "fully and currently informed

of the intelligence activities of the United States," 50 U.S.C. 3091, and to provide those committees requested information, 50 U.S.C. 3092(a)(2); see also 50 U.S.C. 3093(b). However, the documents that section 6316 of the Act would require the President to share would often contain Presidential communications, the confidentiality of which "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*. Because my Administration's commitment to keeping the intelligence committees fully and currently informed provides the Congress with the comprehensive and detailed information it needs to oversee the activities of the Intelligence Community, there is no constitutional justification for the additional intrusion section 6316 of the Act would require into confidential and sensitive Presidential communications. Accordingly, section 6316 of the Act is unconstitutional to the extent it imposes requirements for access to those communications beyond those already present under existing law. I will commit to complying with its disclosure requirements only in such cases where a committee has a need for such Presidential communications that outweighs the potential harm to the confidentiality interests underlying the Presidential communications privilege.

A number of provisions of the Act may, in certain circumstances, interfere with the exercise of my constitutional authority to articulate the positions of the United States in international negotiations or fora (e.g., sections 1260(a), 1508(a), 1658(a), 5518(d), 5573(b), 5701, and 11338(b)). I recognize that "[i]t is not for the President alone to determine the whole content of the Nation's foreign policy" (*Zivotofsky v. Kerry*) and will make every effort to take action consistent with these directives. Indeed, I support many of the objectives in these provisions. Nevertheless, I will not treat them as limiting my constitutional discretion to articulate the views of the United States before international organizations and with foreign governments.

Section 9303(b)(1) of the Act provides that the Secretary of State "should" establish or upgrade certain diplomatic facilities in foreign nations. Although section 9303(b)(3) of the Act later refers to these provisions as "requirements," I do not read section 9303(b) of the Act to mandate the specified actions.

Section 7201 of the Act requires Presidential designees to enter into information-sharing agreements with certain congressional officers "for timely sharing of tactical and operational cybersecurity threat and security vulnerability information and planned or ongoing counterintelligence operations or targeted collection efforts with the legislative branch." The congressional findings in section 7201 of the Act make clear that the information-sharing in question is designed to ensure that the Congress has information concerning cybersecurity and counterintelligence threats to the Congress itself. I therefore construe the requirements of section 7201 of the Act to be limited to information-sharing related to such cybersecurity and counterintelligence threats to the legislative branch.

JOSEPH R. BIDEN JR.

The White House,
December 23, 2022.

NOTE: An original was not available for verification of the content of this statement. H.R. 7776, approved December 23, was assigned Public Law No. 117-263.

Categories: Bill Signings and Vetoes : James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, signing statement.

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